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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that his claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for negligent damage to certain goods seized by the Customs Service is barred by the exception in the FTCA for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. 2680(c).

1. When petitioner, then a member of the Navy, was transferred to Philadelphia from his former station in Guam, he brought with him a number of items of oriental art. On February 28, 1978, agents of the United States Customs Service, acting under authority of a search warrant, seized certain of these art objects on suspicion that petitioner had brought them into the United States intending to resell them, contrary to the statements contained in

his customs declaration (Pet. 2-3). Following a jury trial, petitioner was acquitted of the charge of smuggling the goods into the country in violation of 18 U.S.C. 545 (Pet. App. 2). Thereafter, the Customs Service notified petitioner that the goods were subject to civil forfeiture for violation of 19 U.S.C. 1592. Petitioner filed a petition for relief from the forfeiture under 19 U.S.C. 1618, which the Customs Service subsequently granted. The Service returned the goods on June 1, 1979 (Pet. 3).

On September 21, 1979, petitioner filed an administrative claim with the Customs Service, alleging that some of the art objects had been damaged by the government while being seized or while in the government's possession. Relying on the exception in 28 U.S.C. 2680(c), the Customs Service denied the claim (Pet. 3). Petitioner then filed suit in the United States District Court for the Eastern District of Pennsylvania. That court granted the government's motion to dismiss the complaint (Pet. App. 14).

The court of appeals affirmed, with one judge dissenting (Pet. App. 1-11). Noting (*id.* at 4 & n.3) that the lower courts have disagreed as to the scope of Section 2680(c), and that this Court declined to resolve that disagreement in *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 462-463 n.3 (1980), the court of appeals aligned itself with the decisions holding that the exception embraces all claims for damages arising out of the detention of goods in the custody of the Customs Service, and not merely claims for damages caused by the fact of detention alone. The court declined to follow the leading contrary case, *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (2d Cir. 1958), because its "rationale ignores the clear language of § 2680(c), the legislative intent, and specific teachings of the Supreme Court regarding interpretation of exceptions to the FTCA" (Pet. App. 5).

2. The decision of the court of appeals is correct and does not merit this Court's review. And, as in *Hatzlachh Supply Co.* v. *United States, supra,* 444 U.S. at 462-463 n.3, there is no need for the Court to resolve the conflict between the decision below and the 1958 decision of the Second Circuit in *Alliance.*[1]

a. This Court has repeatedly held that the plain and ordinary meaning of the language used in a statute must be given effect, unless there is strong evidence that a different reading was intended. See, *e.g., Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). There is nothing in the language of Section 2680(c) that would justify reading into it a distinction between a claim for consequential damages due to wrongful detention of goods and a claim for damages for negligent handling of goods properly detained. The section uses extremely broad language. It bars recovery on "[a]ny claim arising in respect of * * * the detention of any goods" by a customs officer. Because petitioner's claim is for damage done to his goods during and as the result of their detention by the Customs Service, it is a "claim arising in respect of" that detention, and thus outside the government's consent to be sued in tort.[2]

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[1] *Alliance* was followed by the Ninth Circuit in a short, per curiam opinion that quotes the entire discussion of the issue in *Alliance* but adds no additional discussion. *A-Mark, Inc.* v. *United States Secret Service,* 593 F.2d 849 (9th Cir. 1978). See also *A & D International, Inc.* v. *United States,* 665 F.2d 669 (5th Cir. 1982). On the other hand, the position adopted by the Third Circuit in the instant case was also taken in *United States* v. *One (1) Douglas A-26B Aircraft,* 662 F.2d 1372 (11th Cir. 1981); *United States* v. *One (1) 1972 Wood, 19 Foot Custom Boat,* 501 F.2d 1327, 1330 (5th Cir. 1974); and *S. Schonfeld Co.* v. *Steamship Akra Tenaron,* 363 F. Supp. 1220 (D.S.C. 1973).

[2] Judge Weis in dissent suggested that the term "in respect of" limits the coverage of the exception and that the exception would be significantly broader if the section had been written to cover any claim

Nor does petitioner cite any legislative history that would require, or even suggest, his limited reading of the exception. Congress never explained the intended scope of the customs exception; it stated only that the exceptions taken as a whole bar "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). A prohibition against claims for negligent damage to goods properly detained by the Customs Service in the course of enforcing the customs laws is consistent with this statement of general purpose.

b. In any event, the issue does not merit review by this Court. Although there currently is a disagreement among the circuits on the correct construction of Section 2680(c), the issue arises only sporadically. Moreover, this issue of statutory construction is not significant, as evidenced in part by the government's decision not to ask this Court to resolve the conflict following the adverse decision in *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849 (9th Cir. 1978) (see note 1, *supra*).

Equally important, the existence of alternative remedies makes reliance on the FTCA unnecessary. As the government acknowledged in *Hatzlachh* (444 U.S. at 465-466), the law has long recognized that one may bring a tort action against the customs collector personally for negligent damage to goods in his possession. See *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974). The successful plaintiff in such an action need not worry that a judgment against the revenue officer will not be paid, for if the court certifies that the detention was made with probable cause,

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"arising out of" a detention (Pet. App. 9-10). In our view, there is little, if any, difference between the two phrases; they are equally broad restrictions on the waiver of sovereign immunity.

or that the officer acted under the direction of another government officer, then any judgment against the officer will be indemnified by the United States. 28 U.S.C. 2006.[3]

There may also be a second alternative remedy. In *Hatzlachh*, the Court held that the FTCA does not bar the filing of an action for breach of contract under the Tucker Act, 28 U.S.C. 1491. The Court remanded the case to the Court of Claims to determine whether there was an implied-in-fact contract of bailment. Justice Blackmun dissented (444 U.S. at 466-468). He agreed that the FTCA did not bar resort to the Tucker Act, but concluded that no implied-in-fact contract could arise from the seizure and forfeiture of goods under the customs laws. Because the Court of Claims has no jurisdiction over contracts implied in law, see *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217-218 (1926), Justice Blackmun thought that the Court's remand in *Hatzlachh* "is, or should be, a useless exercise leading to an inevitable result" (444 U.S. at 467).

The remand proceedings in *Hatzlachh* are still pending. On remand, the government has argued, as suggested by Justice Blackmun, that the seizure and forfeiture of goods under the customs laws does not create an implied-in-fact contract of bailment. Should that argument prove unsuccessful, however, persons such as petitioner will be able to seek redress under the Tucker Act as well as through private damages actions against customs officials.[4] We therefore

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[3]Petitioner's goods were seized in 1978 and returned to him in 1979. Assuming that a suit against the customs agents personally would be decided under Pennsylvania law, where the seizure took place and where petitioner and presumably the customs officials involved in his case reside, the applicable statute of limitations would appear to be two years. See 42 Pa. Cons. Stat. Ann. § 5524(3) (Purdon 1981). Petitioner's failure to take timely advantage of this alternative remedy furnishes no basis for this Court's intervention.

[4]The six-year statute of limitations contained in 28 U.S.C. 2401(a) has not yet expired in petitioner's case.

believe that it would be premature for the Court to consider the proper scope of Section 2680(c) at this time. Only after the conclusion of the remand proceedings in *Hatzlachh* will the Court be in a position to determine whether the absence of an FTCA remedy is of any practical significance. If Justice Blackmun's view prevails, there will be time enough for the Court to construe Section 2680(c) in a future case.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1982

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[5]Petitioner makes two additional claims that do not merit this Court's review. First, he argues that the district court did not give a reason for its dismissal of the complaint (Pet. 9-10), but the government relied on Section 2680(c), leaving little doubt as to the district court's rationale. Furthermore, any defect in the district court's order was cured by the court of appeals, which was explicit in its rationale for affirming. Petitioner next argues that even the government's interpretation of Section 2680(c) would not cover two items — one article damaged during the seizure but not detained and a stereo that could not be repaired under warranty because the government had seized the receipt (Pet. 10-11). This argument, which is of little continuing importance, was not made to the court of appeals and should not be considered now.

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